

05-541 OCT 26 2005  
No. 05-

IN THE  
Supreme Court of the United States

Empagran, S.A. et al.,  
*Petitioners*,

v.

F. Hoffmann-LaRoche Ltd. et al.

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the District of Columbia Circuit

**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

In its previous decision in this case, this Court ruled that a person may not recover under the Sherman Act for injuries incurred overseas that are wholly "independent of" the effects of the defendants' conduct in this country. This Court remanded to permit the D.C. Circuit to decide in the first instance whether a Sherman Act claim could be stated if the plaintiff's injuries were instead intertwined with the defendants' domestic conduct.

The Question Presented is:

Whether an overseas purchaser from an international cartel states a claim under the U.S. antitrust laws if its injury arose from the cartel's unlawful activities in the U.S. and the cartel intended its activities in this country to cause the injury.

#### **RULE 29.6 STATEMENT**

Respondent Empagran has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Empagran.

Respondent Nutricion has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Nutricion.

Respondent Windridge is the business name for the business owned and operated in partnership by Cynray Pty. Ltd. and Larkray Pty. Ltd. Both of these companies are proprietary limited companies, all of the shares of which are held by natural persons.

Respondent Stirol has no parent companies, and no publicly held companies have a 10% or greater ownership interest in Stirol.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners Empagran, S.A. et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### **OPINIONS BELOW AND JURISDICTION**

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-8a) is published at 417 F.3d 1267. The district court's original opinion dismissing petitioners' case (Pet. App. 88a-106a) is unpublished. The opinion of the court of appeals reversing the district court and reinstating petitioners' claims (Pet. App. 47a-87a) is published at 315 F.3d 338. This Court's opinion vacating the decision of the court of appeals and remanding to the court of appeals for further proceedings (Pet. App. 28a-46a) is published at 124 S. Ct. 2359. The initial per curiam opinion of the court of appeals on remand from this Court (Pet. App. 9a-27a) is published at 388 F.3d 337.

The court of appeals issued its opinion on June 28, 2005. On September 19, 2005, Justice Ginsburg extended the time to file this petition to and including October 26, 2005. App. No. 05A262. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

### **RELEVANT STATUTORY PROVISIONS**

1. Section 1 of the Sherman Act (15 U.S.C. 1) provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is declared illegal.

2. The Foreign Trade Antitrust Improvements Act of 1982 (15 U.S.C. 6a) provides in relevant part:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct had a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations;

or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

3. Section 4 of the Clayton Act (15 U.S.C. 15) provides in relevant part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

#### STATEMENT OF THE CASE

This petition for certiorari presents the significant unfinished business of *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004). This Court previously granted certiorari in this case to decide the important question whether the customers of a global cartel that operates in this country may bring suit under the U.S. antitrust laws for inju-

ries suffered as a result of purchases made outside the United States. The Court was unable to fully answer that question in the prior appeal. Instead the Court held only that if a foreign purchaser's injuries are wholly "independent of" the cartel's effects in the United States, the Sherman Act provides no remedy. The Court directed the D.C. Circuit to consider in the first instance whether a Sherman Act claim was stated when the plaintiffs' injuries are caused by the domestic effects of a cartel's conduct. On remand, however, the court of appeals disposed of that vital issue in a single paragraph of *ipse dixit*, summarily holding that such a claim is unavailable as a matter of law, even if the defendants intended their illegal conduct in the United States to injure persons overseas and even if that injury could not have occurred absent the domestic effect of that unlawful activity. This Court's failure to review that utterly opaque ruling would leave the antitrust laws in a considerable state of uncertainty and would permit defendants to escape with more than \$10 billion dollars in illegal profits that arose directly from their unlawful conduct in this country. Certiorari should accordingly be granted.

1. The defendant-respondents in this case are U.S. bulk vitamin producers and their foreign affiliates. Together they perpetrated "the most pervasive and harmful criminal antitrust conspiracy ever uncovered." Joel I. Klein, Ass't A.G., *International Anti-Cartel Enforcement*, Speech of Sept. 30, 1999, at 5. It is undisputed that defendants' cartel extracted billions of dollars in illegal profits from U.S. consumers.

The plaintiff-petitioners are overseas direct customers of respondents. As is now relevant, plaintiffs' Sherman Act complaint relies on two essential facts. First, defendants' illegal activities in the United States were essential to maintaining the cartel's operations worldwide. Second, and closely related, the overseas effects of the cartel were a knowing and purposeful consequence of defendants' conduct in this country. In particular, the domestic restraints on competition were specifically intended to prevent plaintiffs from purchasing bulk vitamins at lower prices from the United States directly